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No. 88-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PULLMAN-STANDARD,

Petitioner,

—v.—

LOUIS SWINT, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondents' opposing brief simply does not take issue with the central propositions of the petition: (1) that the Eleventh Circuit below imposed liability on petitioner in a manner flatly at odds with this Court's requirements for a prima facie disparate impact case and this Court's articulation of the defense burden, as initially set forth in the plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988) and subsequently adopted by the majority in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989); (2) that the Court of Appeals violated the strictures of *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), and Article III of the Constitution in permitting plaintiffs who were hired outside of the liability period and who never asserted individual claims of discriminatory denial of supervisory positions to serve as representatives of a class asserting such claims; (3) that the Court of Appeals ignored this

Court's directive in *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982), by reaffirming the *de novo* appellate fact-finding that pervaded that court's prior ruling; and (4) that the Eleventh Circuit applied a statute of limitations to respondents' 42 U.S.C. § 1981 (1982) claim that cannot stand in light of *Owens* v. *Okure*, 109 S. Ct. 573 (1989).

Conceding that these issues may be appropriately considered by this Court at some later point—presumably after years of backpay hearings for the thousand or more members of the class—respondents oppose the petition principally on the ground that a jurisdictional bar of sorts prevents review at this time. And where this supposed jurisdictional hurdle does not suffice, respondents attempt to dismiss the import of the ruling below by suggesting that critical conclusions of the Court of Appeals incontestably at variance with *Wards Cove* are "dictum" (Brief in Oppos., p. 8) or involve "essentially fact-specific questions" (*id.* at 10); that petitioner's objections to class representative standing of the named plaintiffs are "now clearly moot" (*id.* at 13) and constitute an attack "on Rule 23 itself" (*id.* at 20); and that petitioner's *Owens* v. *Okure* contention either has been waived or is in any event of "somewhat limited" practical significance (*id.* at 21).

We respectfully submit that none of respondents' arguments has the slightest merit, and that the petition—as respondents' silence on the merits more than suggests—raises substantial questions concerning the appropriate ground rules for employment discrimination class actions in the post-*Watson* era. Should this Court deem it appropriate, however, to await further developments in light of its rulings last Term in *Wards Cove*, *Owens* v. *Okure*, and *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989), we would urge that the judgment of the Court of Appeals be vacated and the case remanded to the Court of Appeals, directing that court to reconsider its decision in light of this Court's recent pronouncements—ones that respondents tellingly dismiss as "seemingly incessant changes in the law" (Brief in Oppos., p. 26).

1. The absence of supporting authority for respondents' jurisdictional contention speaks for itself. The cases are legion to the effect that 28 U.S.C. § 1292(b) (Supp. V 1987) "authorizes certification of *orders* for interlocutory appeal, not certification of *questions*." *Isra Fruit Ltd.* v. *Agrexco Agricultural Export Co.*, 804 F.2d 24, 25 (2d Cir. 1986) (emphasis in original). As Judge Easterbrook recently observed in *Edwardsville National Bank and Trust Co.* v. *Marion Laboratories, Inc.*, 808 F.2d 648, 650 (7th Cir. 1987): "The statute refers to certifying an 'order' for interlocutory appeal. It is not a method of certifying questions. The question is the *reason* for the interlocutory appeal but the thing under review is the order." (Emphasis in original)[1]

Here, the orders of the District Court appealed from reaffirmed the finding of liability with respect to the claim of discrimination in supervisory selections and set the case for so-called "Phase II" backpay hearings, *see Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 7-8 (N.D. Ala. Sept. 8, 1986) (App. 269a); and, while reaffirming the finding of liability with respect to the initial assignment claim, entered judgment for petitioner in accordance with that court's ruling as to the date commencing the liability period, *see id.* at 11-14 (App. 273a-276a). The trial court then granted respondents' motion for entry of a final judgment under Fed. R. Civ. P. 54(b) on all claims other than the supervisor selection claim, and certified an appeal of its order adverse to petitioner on the latter claim. *See Swint* v. *Pullman-Standard* (*Swint X*), No. CV 71-P-0955-S, slip op. at 1-2 (N.D. Ala. Nov. 26, 1986) (App. 284a-285a). Accordingly, the Court of Appeals had authority "to consider 'all grounds advanced in support of the [orders reaffirming Pullman's liability and entering final judgment against respondents] and all grounds suggested for' [overturning those orders]." *Miller* v. *Bolger*, 802 F.2d 660, 666 (3d Cir.

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1 *Accord, e.g., Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987) ("the nature and scope of our review are not rigidly determined by the certified questions"); *Miller* v. *Bolger*, 802 F.2d 660, 666 (3d Cir. 1986); *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 983 n.16 (5th Cir. 1985).

1986), *quoting Struble* v. *New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 336 n.10 (3d Cir. 1984).

Accepting respondents' restrictive view of the power of a Court of Appeals on a § 1292(b) appeal would place appellate courts in the untenable position of rendering advisory opinions on questions that may not be material to a proper review of the order before the court. To quote again from Judge Easterbrook:

> "Were things otherwise, there would be a substantial risk of producing an advisory opinion. If nothing turns on the answer to the question, it ought not be answered; on the other hand, once the interlocutory appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that promoted the appeal." *Edwardsville National Bank*, *supra*, 808 F.2d at 651.

Respondents' position would also undermine this Court's acknowledged plenary authority to "reach back and correct errors in the interlocutory proceedings below, even though no attempt was made to secure review of the interlocutory decree or even though such an attempt was made without success." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 (6th ed. 1986); *see* Brief in Oppos., pp. 6-7. Respondents advance no basis to conclude that the legal issues raised in the instant petition are not ripe for review at this time, or that any further light on those issues will be shed by inevitably protracted Phase II backpay hearings premised on findings of liability inconsistent with this Court's controlling decisions.

2. Aside from raising this purported jurisdictional barrier to review, respondents are driven to recharacterize the ruling below in order to square the Eleventh Circuit's holding with *Wards Cove*. It would surely come as a surprise to the judges on that panel that their insistence that "[t]he burden—not just of production but of persuasion—was then on Pullman to show that the practice challenged arose from a non-discriminatory business necessity," *Larkin* v. *Pullman-Standard*, 854 F.2d 1549, 1580 (11th Cir. 1988) (*Swint XI*), *pet. for cert. filed sub*

nom. Pullman-Standard v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (App.53a) was mere "dictum," and that they were really holding "that petitioner had failed to meet its burden of *production*." (Brief in Oppos., p.8; emphasis in original). One also searches in vain for the faintest recognition by the appeals court that plaintiffs cannot simply level an attack on the "bottom line" results of a subjective selection system but, rather, must meet a "specific causation requirement"—"a demonstration that specific elements of the [petitioner's selection] process have a significantly disparate impact on nonwhites." *Wards Cove* v. *Atonio*, *supra*, 109 S. Ct. at 2125.

3. As for the response to petitioner's *Falcon*-class representative standing argument, respondents' suggestion of mootness is illusory. The Court of Appeals, in reviewing the final judgment entered against respondents on the initial assignment claim, essentially revived petitioner's liability on that claim by enlarging the liability period. That court then proceeded to consider, and reject, petitioner's *Falcon* and constitutional standing objections. Those objections were properly before the Eleventh Circuit and they are properly before this Court.

Respondents also mischaracterize petitioner's position as a wholesale attack on Rule 23 itself. Far from that, it is simply petitioner's view that *Falcon* and Article III require that at the point of certification, the class representatives' personal claims correspond to the claims they are asserting on behalf of the class. Such correspondence—essential to ensuring that the named plaintiffs will fairly and adequately represent the interests of the class—was absent here. Respondents' discussion (Brief in Oppos., p. 16) fails to grapple with the fact that, *at the time of certification*, the named plaintiffs had no personal claim of initial assignment discrimination because they were hired either before the enactment of Title VII or before the beginning of the relevant liability period.[2] The lesson appar-

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2 The named plaintiffs also had no personal stake in the supervisory selection claim because they never alleged an individual claim of discriminatory denial of a supervisory promotion, and indeed respondent Swint had actively encouraged black employees to reject offers of promotion to supervisor. *See* Petition at 4 n.8.

ently emerging from the Eleventh Circuit is that *Falcon*'s strictures against "across-the-board" certification may be readily evaded by attaching to a seniority system challenge objections to a host of other employment practices—as to which the named plaintiffs have no personal complaint—that somehow may impact on seniority entitlements.

4. Finally, concerning petitioner's *Owens* v. *Okure* argument, it is misleading to suggest that this issue is of limited practical significance. If the applicable statute of limitations governing the § 1981 claim provides for a one-year period, petitioner will face *no* liability on that claim—and thus no spectre of compensatory and punitive damages—because the complaint in this case was filed more than one year after any initial assignment discrimination was found to have ended.

Respondents' suggestion of waiver is similarly unfounded. Petitioner's answer raised the defense of statute of limitations.[3] This was plainly understood by the District Court in its pre-trial order to be a defense "based upon applicable statutes of limitation." Joint App., p. 30 in Nos. 80-1190 & 80-1193, *Pullman-Standard* v. *Swint* (*Swint VII*) 456 U.S. 273 (1982). In the District Court's view, a one-year statute of limitations "was incorporated into the class definition in the pretrial order" (*Swint X*, *supra*, at 2) (App. 280a), obviating any need on petitioner's part to amend its answer. Given the extensive consideration of the various statutes of limitations proposed by both sides in this litigation, and the Court of Appeals' reluctance to rest its decision on grounds of waiver, this Court is certainly

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3 This is not a case where a defendant fails to raise the issue of statute of limitations at all. Hence the treatise citations in the opposition brief (Brief in Oppos., p. 23 n. 13) appear inapposite. *See*, *e.g.*, *Santos* v. *District Council of United Brotherhood of Carpenters*, 619 F.2d 963, 967 (2d Cir. 1980), citing *Reconstruction Finance Corp.* v. *Tuolome Gold Dredging Corp.*, 137 F. Supp. 855, 862 (N.D. Cal. 1953), *aff'd*, 230 F.2d 479 (9th Cir.), *cert. denied*, 352 U.S. 832 (1956); *Gobla* v. *Crestwood School Dist.*, 628 F. Supp. 43, 46 (M.D. Pa. 1985), *aff'd*, 804 F.2d 1248 (3d Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987). Respondents here were placed on notice throughout the litigation that petitioner was challenging their compliance with the applicable statute of limitations.

free to consider the plainly important question of the retroactive effect of *Owens* v. *Okure*.

CONCLUSION

For all the foregoing reasons and those stated in our initial papers, petitioner respectfully requests that its petition be granted or, in the alternative, that the judgment of the Court of Appeals be vacated and the case remanded for reconsideration in light of *Wards Cove*, *Owens* v. *Okure* and *Patterson*.[4]

Respectfully submitted,

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4 The petition was filed before this Court's decision in *Patterson*, and hence does not take account of that decision. Petitioner submits, however, that the Court of Appeals' affirmation of Pullman's liability under § 1981 raises the question whether discrimination in initial departmental assignments is actionable in any event under that statute, "which covers only conduct at the initial formation of the contract. . . ." *Patterson* v. *McLean Credit Union*, *supra*, 109 S. Ct. at 2374.